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IN THE

U. S. Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

WILLIAM STEWART,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

BENTON DICK,
Attorney for Plaintiff in Error.

Filed this.....day of.....1913.

.....Clerk,

By.....Deputy Clerk.

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WILLIAM STEWART,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Plaintiff in Error.

William Stewart, the plaintiff in error, was jointly indicted with one John B. Goodwin, on the 16th day of May, 1911, by the Grand Jury of the United States, within and for the Fifth Judicial District of the Territory of Arizona, for the crime of murder committed upon the person of one Fred Kibbe. A severance was demanded by the plaintiff in error and he was ordered tried separately. The indictment was transferred to the United States District Court for the District of Arizona, by the admission of the Territory into the Union. Plaintiff in error was tried by a jury which

returned a verdict of guilty of murder of the first degree without any qualification and he was sentenced to be executed on the 1st day of August, 1913.

From the judgment and order of the United States District Court for the District of Arizona, overruling defendant's motion for a new trial, the case is brought to this Court upon a writ of error.

Statement of the Case.

It appears from the evidence on behalf of the United States, that one Fred Kibbe and one Alfred Hillpot were shot and killed on the 15th day of September, 1910, at a place commonly known as Tuttle's Station, upon the White Mountain Indian Reservation, in the county of Gila, in the Territory of Arizona. That William Stewart, the plaintiff in error herein, and one John B. Goodwin, had been living in the house at Tuttle's Station, where the murder was committed, for some time prior to the commission of the offense. That Stewart and Goodwin disappeared on the night of the murder and were trailed by the officers to a point in the Northern part of the Territory where they were placed under arrest several days later and that upon being searched they were found to have in their possession certain articles of personal property belonging to the dead men. That Stewart and Goodwin were immediately asked by the officers why they killed Kibbe and Hillpot and Stewart replied that they had a fight over a dog; that they had to do it and that it was in self-defense. Other witnesses for the government testified that similar statements were made by Stewart while he was confined in jail at Globe.

Plaintiff in error, testifying in his own behalf, denied that he killed Kibbe or Hillpot, or that he had anything to do with it further than to take from the person of Hillpot a pocketbook and that this was done under Goodwin's direction, after the murder was committed, and that he was forced to do this by reason of fear of bodily harm from Goodwin who was armed. Plaintiff in error denied making the statements attributed to him by the officers at the time of his arrest. He admitted making statements in jail in substance as stated by the different witnesses for the government; but said that Goodwin made up the story and induced him to tell it and stated that it was intended as a joke.

The record discloses the fact that numerous errors were committed in the admission and rejection of evidence; in the instructions of the Court; and prejudicial statements of the United States Attorney, which were incompetent and improper and by reason of which his substantial rights were prejudiced.

Assignment of Errors.

(I.)

The Court erred in instructing the jury as follows:

> "The flight of the defendant with Goodwin from the place of the murder is also evidence of guilt and a fact for your consideration."
>
> Reporter's transcript, p. 493.

(II.)

The Court erred in admitting in evidence, over defendant's objection, a certain map (plaintiff's Exhibit "M") without proof of its accuracy or authenticity.

Reporter's transcript, pp. 275, 276.

(III.)

The court erred in overruling defendant's objection to the empaneling of certain jurors summoned upon a special venire, whose names were not delivered to defendant at least two days before the trial.

Reporter's transcript, p. 92.

(IV.)

The Court erred in permitting the witness for the government, John W. Shafer, to testify, over defendant's objection, as follows: "I should say from my knowledge of the Indian, to the best of my belief that the defendant is not an Indian."

Reporter's transcript, p. 346.

(V.)

The court erred in permitting the United States Attorney to make the following remarks at the close of his opening statement to the jury:

> "We will ask you to reach a verdict of guilty and affix the death penalty on this young man as has been done on his partner in crime."

Reporter's transcript, p. 136.

(VI.)

The Court erred in permitting counsel for the government to cross-examine plaintiff in error as follows:

> "Q. Did you have a letter from John B. Goodwin telling you that he had deserted and that he was at Angel Island and had deserted from there and that he wanted to come to Tuttle's Station?"

"A. I don't understand the question. I had a letter stating ———"

"Q. Did you receive a letter?"

"A. Yes, sir."

"Q. Have you got it?"

"A. No, sir."

"Q. What became of it?"

"A. It was destroyed."

"Q. State what the letter said."

"A. He said that he was coming."

Reporter's transcript, pp. 388, 389.

(VII.)

The Court erred in permitting counsel for the government to cross-examine plaintiff in error as follows:

> "Q. Was he (Goodwin) a deserter from the United States Army at that time if you know?"

"A. I didn't know positively that he was a deserter, no sir."

"Q. He told you that he was?"

"A. Yes, sir."

Reporter's transcript, p. 390.

(VIII.)

The Court erred in permitting counsel for the government to cross-examine plaintiff in error as follows:

"Q. "But did he suggest to you, did he to kill those two boys?"

"Q. What did you say?" "A. I told him that I didn't want anything to do with anything like that at all."

"Q. You were not very much surprised when he suggested to you to murder those boys?" "A. Well, no sir."

"Q. He was rather in the habit of doing that to you wasn't he?" "A. Yes, sir."

"Q. How many times before that had he suggested to you, as you say, to kill other people that were through and around that camp where you were harboring this deserter?" "A. I don't know. Three or four times."

"Q. Didn't you think that was rather extraordinary for a man to suggest to you to murder people who came around there?"

"A. I didn't think the man would do anything like that."

"Q. You didn't think he meant it; he did mean it, didn't he?" "A. Probably he did mean it."

Reporter's transcript, pp. 391, 392, 393.

(IX.)

The Court erred in permitting counsel for the government to cross-examine plaintiff in error, over his objections, as follows:

"Q. What did Goodwin say to you about murdering Bill Tuttle; what did Goodwin say to you?" "A. He said something about killing Mr. Tuttle."

"Q. Did you tell Bill Tuttle about it?" "A. No, sir."

"Q. Why didn't you tell Bill Tuttle?" "A. I don't know why I didn't tell him."

"Q. You don't know; why didn't you put him on his guard that you were harboring a man like that around his ranch?" "A. I didn't think there was anything to it. I didn't think Goodwin would do anything like that."

Reporter's transcript, pp. 393, 394.

(X.)

The Court erred in sustaining the objection of counsel for the government to the question: "How did you come to see the guns and ammunition?" propounded by counsel for plaintiff in error to the witness, Stewart, after counsel's avowel that he expected to prove that whatever Stewart did was under coercion by Goodwin.

Reporter's transcript, pp. 368, 369.

ARGUMENT.

Assignment No. I.

This assignment is based upon error in instructing that the flight is evidence of guilt.

Reporter's transcript, p. 493.

This instruction is erroneous and misleading and we do not believe the qualifying words, "and a fact for your consideration" remedy the evil. The words, "the flight of the defendant with Goodwin from the place of the murder is also evidence of guilt", stand out in bold relief and completely overshadow the qualifying words. It is virtually an instruction that as a matter of law the defendant is guilty of the offense charged in the indictment if he fled from the place of the murder and it is quite reasonable to assume that the jury so understood it. The average juror is not capable of drawing nice distinctions.

That this instruction conduced to the conviction of

the defendant and prejudiced his substantial rights, it seems to us there can be little question. The province of the jury was invaded by the Court. The jury was bound to follow the instructions of the Court, even though erroneous, and in doing so would necessarily find the defendant guilty, because there was evidence before them that he had fled. In other words: the Court passed upon both the law and the facts. The jury has the sole power to determine the facts and that power was, in this case, usurped by the Court.

The defendant might as well have submitted the question of his guilt or innocence to the Court sitting without a jury.

It has been repeatedly held that flight of the accused raises no presumption of law that he is guilty; but it is a fact which may be considered by the jury and from which an inference may be drawn, in connection with other circumstances, that he is guilty.

Starr vs. U. S., 164 U. S. 627 (L. Ed. 41, 577.)

Allen vs. U. S., 164 U. S. 492 (L. Ed. 14, 528.)

Alberty vs. U. S., 162 U. S. 499 (L. Ed. 40, 1051.)

Hickory vs. U. S. 160 U. S. 408.

In the Starr case, above cited, the United States Supreme Court held that an instruction that flight raises a presumption of guilt and is a silent admission that the defendant is unable or unwilling to face the case against him, was erroneous.

In the Alberty case, also above cited, the United States Supreme Court held that it was misleading for the Court to charge the jury that, from the fact of absconding they might infer the fact of guilt, and that flight is a silent admission by the defendant that he is unable to face the case against him.

In the Hickory case, also cited above, the same Court held that one of the instructions (with which we have no doubt the Court is more familiar than counsel, and which we will not quote at length) was "tantamount" to saying to the jury that flight created a legal presumption of guilt.

In the Allen case, also above cited, the United States Supreme Court held that the flight of an accused person is competent evidence against him, as having a tendency to establish his guilt.

Therefore, the law seems to be well settled that flight does not raise a legal presumption of guilt, nor is it even a fact from which guilt may be inferred for, as the Court said in the Alberty case: "It lays too much stress upon the fact of flight, and allows the jury to infer that this fact alone is sufficient to create a presumption of guilt."

But, in the case at bar, the Court goes even further than did the trial Court in either of the cases above cited, all of which, excepting the Allen case, were reversed, and says, not that flight raises a presumption of guilt, or that the defendant's guilt may be inferred from the fact of his flight; but says: "The flight of the defendant with Goodwin from the place of the murder is also evidence of guilt——"

The Court does not give the defendant the benefit of an instruction that: "the flight of the accused is competent evidence against him, as having a tendency to establish his guilt," thereby leaving the jury to determine the weight to be attached to the evidence; but on the contrary, virtually instructs the jury that the defendant is guilty because he fled.

Assignment No. II.

This assignment is based upon error in the admission of a certain map without proof of its accuracy or authenticity.

Reporter's transcript, pp. 275, 276.

The map in question was offered in evidence for the purpose of proving that Tuttle's Station was situated upon the White Mountain Indian Reservation. It was essential to establish that fact in order to give the United States jurisdiction.

Where the question of jurisdiction is involved, as in the case at bar, a map, in order to be admissible should be proved to be correct and to accurately represent the boundaries of the territory in question.

> "Maps are not independent evidence, and are only competent and material in so far as they are shown to be correct by other testimony in the case."

Johnston vs. Jones (U. S.) 17 Law. Ed. 117.

The evidence introduced in this case to establish jurisdiction was not the best evidence of which the

case in its nature was susceptible. It would seem to us that the best evidence would be the proclamation, or executive order, setting apart the land as a reservation and defining the boundaries. This, together with a correct, and official map or plat, showing the locality where the crime was committed would be the best evidence.

It is true that certain witnesses for the government testified that Tuttle's Station was on the White Mountain Indian Reservation; but it was not shown that they had the means of knowledge of that fact. It was hearsay and does not come within any of the exceptions permitting such evidence.

This case is distinguished from the case of Holt vs. U. S., 218 U. S. 1021, where a witness for the government testified that certain barracks were within the enclosure of Fort Worden, under military guard and control and that the fence was coincident with the boundaries shown on a map in the Engineer's Department, made from original surveys of the War Department.

In the case at bar the jurisdictional question is of the utmost importance for the reason that the plaintiff in error had previously been convicted of killing Fred Kibbe, in the District Court of the Fifth Judicial District, of the Territory of Arizona, and sentenced to life imprisonment, upon the theory that the Territory had jurisdiction.

Reporter's transcript, pp. 460, 461, 462, 463.

Assignment No. III.

This assignment is based upon error in empaneling and swearing certain trial jurors whose names were not delivered to defendant at least two days before the trial of the case.

Reporter's transcript, p. 92.

Section 1033, Revised Statutes, U. S. provides that . . . . . "when any person is indicted for any other capital offense, such copy of the indictment and list of the jurors and witnesses shall be delivered to him at least two entire days before the trial."

It was held in Logan vs. U. S., 144 U. S. 263, that: "The provision is not only directory, but mandatory to the government; and its purpose is to inform the defendant of the testimony he will have to meet, and to enable him to prepare his defense."

If the provision is mandatory as to witnesses it certainly is as to jurors, and for the same reason. The defendant has the right to know the names of the jurors and their place of residence in order that he may properly prepare his defense by investigating their character and standing; their religious and political affiliations, and their business and social associations, that he may properly and intelligently interrogate them as to their fitness to serve as jurors. These matters cannot, as a rule, be developed by a general line of questions such as counsel would be able to formulate in the space of a few moments. This applies with still greater force in Federal cases where the jurors are

drawn from the entire district and not from one county only as in state cases.

Counsel for the government may argue that it would be impracticable to take an adjournment for two days after beginning the trial of the case, for the purpose of summoning special veniremen after giving the statutory notice; but we submit that this is not a question of expediency but that of a substantial right, the violation of which deprived him of a fair and impartial trial.

Assignment No. IV.

This assignment is based upon error in permitting a witness for the government to testify, over defendant's objection, that from his knowledge, gained by observation of defendant, that he was an Indian.

Reporter's transcript, p. 346.

It has been held that it may be shown, by general reputation, that a person is a member of a particular race, and "that the evidence is good for what it is worth. As a matter of course it is worth hardly anything in a doubtful case."

Reed vs. State, 16 Ark. 256.

Locklayer vs. Locklayer, 35 Southern 1008.

Assignment No. V.

This assignment is based upon error in permitting the United States Attorney to state to the jury, in sub-

stance, that defendant's partner in crime (Goodwin) had been convicted of the same offense and sentenced to death.

Reporter's transcript, p. 136.

This statement was manifestly improper and tended to prejudice the defendant in the eyes of the jury by alluding to the fact that Goodwin had been convicted and sentenced to death. Such evidence was not competent, material or relavent, under any theory of the case, and it would have a natural tenedncy to create bias and prejudice in the minds of the jurors, leaving a feeling that the defendant should be made to follow in the footsteps of Goodwin.

It is true that the learned trial judge promptly ordered the statement stricken from the record; but it requires something more than mere admonition to strike the impression made by such statements from the minds of the jurors. It is entirely within the range of probabilities that had the jury not known of Goodwin's conviction and sentence to death, they would not have fixed the penalty at death even though they returned a verdict of guilty in this case.

A new trial will be granted, in a criminal case, where the district attorney, during the trial, made improper remarks calculated to prejudice the defendant's case with the jury.

Laubach vs. State, 12 Tex. App. 583.

The Supreme Courts of several states have gone so far as to hold that where the remarks of an attorney

are of such a character that neither rebuke nor detraction can entirely destroy their influence, a new trial should be granted, even though no objection was made, or exception taken.

Chicago R. R. vs. Kellog, 55 Neb. 748 (76 N. W. 462.)

Kansas City Southern R. C. vs. Murphy, 74 Ark. 256, 85 S. W. 428.

Gawn vs. State, 7 Ohio Cir. Dec. 19.

The general rule is that improper statements and conduct upon the part of the district attorney in a criminal prosecution warrant a reversal of a conviction therein, where it can be seen that they might have been the means of procuring a verdict of guilty.

Heller vs. P. (Colo.) 43 Pac. 24.

Raggio vs. P. (Ill.) 26 N. E. 377.

P. vs. Fielding (N. Y.) 46 L. R. A. 641.

Assignment Nos. VI, VII, VIII, IX.

These assignments, which will be considered under one head, are based upon error in permitting counsel for the government to cross-examine plaintiff in error relative to immaterial matters and which were gone into upon direct examination.

It has been held that the cross-examination of a witness must be limited to the matters stated on direct examination, except where questions are asked

to test the credibility of the witness, or his means of knowledge, or to lay the foundation to admit evidence of prior contradictory statements.

Houghton vs. Jones, 1 Wall, 702, 17 Law. Ed. 503.

Wills vs. Russell, 100 U. S. 621, 25 L. Ed. 607.

Phila. & T. Co. vs. Stimson, 14 Peters, 448, 10 L. Ed. 535.

Rea vs. State of Missouri, 21 Law. Ed. 757.

There are other exceptions to the rule, than those above mentioned, to which we do not deem it necessary to call the attention of the Court; and we submit that the cross-examining questions complained of do not come within any of the exceptions to the rule that the cross-examination of a witness must be limited to matters stated on direct examination.

That this line of examination was improper and that it prejudiced the defendant in the eyes of the jury, there can be very little question.

Assignment No. X.

This assignment is based upon error in sustaining an objection to a question by counsel for defendant, after an avowal that he expected to prove that Stewart acted under coercion by Goodwin.

Reporter's transcript, pp. 368, 369.

We desire to call the attention of the Court to the fact that, owing to circumstances over which we

had no control, to-wit: The failure of the court reporter to complete the transcript of the evidence within the time allowed by law to file the writ of error, not all of the errors complained of were assigned; and we respectfully request that the Court consider the errors assigned in our brief, under the rule which provides that the court may notice plain error not assigned.

The question of whether plaintiff in error actually committed the offense charged in the indictment, is not before the Court at this time; the question being, not that of his innocence or guilt, but whether or not he had a fair and impartial trial. The record discloses at least a reasonable doubt on that question. All that plaintiff in error has on this earth—his life—is at stake, and we urge that he is entitled to the benefit of the doubt.

We submit that plaintiff in error did not have a fair trial and that the judgment of the trial court should be reversed.

Respectfully submitted,

BENTON DICK,

Attorney for Plaintiff in Error.

WILLIAM STEWART,
Plaintiff in Error,

vs.

THE UNITED STATES
OF AMERICA,
Defendant in Error.

Brief of Defendant in Error.

It is contended by counsel for the plaintiff in error that the Trial Court erred in its charge to the jury upon the subject of the flight of the defendant. The instruction in question is as follows:

> "The defense of Stewart is that he did not kill Kibbe, and did not participate in the commission of the crime by any act of his own, or by any agreement, plan, or understanding with Goodwin. The defendant admits that he participated in the robbery of the bodies of Hillpot and Kibbe. The statute provides that the killing of a human being committed in the perpetration of or attempt to perpetrate a robbery is murder. The fact of robbery is therefore a direct admission for your consideration. The flight of the defendant with Goodwin from the place of the murder is *also* evidence of guilt and a fact for your consideration.

> The only answer the defendant makes to these admitted facts is that he was compelled by Goodwin to do as he did. Is this answer sufficient in the light of all the events and surrounding circumstances? *This is the question you are called upon to answer by your verdict.*"

Error is assigned for the reason that the Trial Court instructed, as appears above, that "the flight of the defendant * * * is also evidence of guilt." Substantially the same language is approved in the case of Allen vs. United States, 164 U. S. 492, 41 Law Ed. 528 (R. P. 530). In that case the lower Court instructed the Jury as follows:

> "Now, then, you consider his conduct at the time of the killing and his conduct afterward. If he fled, if he left the country, if he sought to avoid arrest, that is a fact that you are to take into consideration *against* him, because the law says that unless it is satisfactorily explained,—and he may explain it upon some theory and you are to say whether there is any effort to explain it in this case,—if it is unexplained the law says it is a fact that may be taken into account against the party charged with the crime of murder upon the theory that I have named, upon the existence of this monitor called conscience that teaches us to know whether we have done right or wrong in a given case."
>
> "Indeed the law is well settled that the flight of the accused is competent evidence against him as having a tendency to establish his guilt."
>
> Wharton on Homicide. Paragraph 710.
>
> People vs. Pitcher, 15 Mich. 397.

The Supreme Court of the United States cites the last quoted authority in connection with the instruction last above referred to, and says:

> "This was the substance of the above instruction, and although not accurate in all its parts we do not think it could have misled the jury."
>
> Allen vs. U. S. Id.

The identical language used by the Trial Court in the case at bar is quoted with approval in the case of Hickory vs. U. S., 160 U. S. 406-408, 40 Law Ed., 474 (R. P. 478-9):

> "In modern times more correct views have prevailed, and the evasion of or flight from justice seems now nearly reduced to its true place in the administration of the criminal law, namely that of a circumstance, a *fact* which it is always of importance *to take into consideration,* and combined with others may afford strong *evidence of guilt x x.*"
>
> "It is true that a subsequent portion of the charge refers to the evidence on the subject of concealment as 'proper to be taken into consideration, as evidence of guilt,' as going to show guilt. But these qualified remarks did not recall the undue weight which the previous language had affixed to the facts to be considered by the jury."
>
> Hickory vs. U. S. Id.

It thus appears that, while the instruction in the last cited case was held erroneous, the Supreme Court did not reach this conclusion because of the fact that the Trial Court in that case instructed the jury that the evidence was proper to be taken into consideration as *evidence of guilt,* but, on the

contrary, this language is approved, as appears from the above quotation. The Court in that case had instructed the jury substantially, that the mere fact that the defendant fled, of itself demonstrated his guilt. The attention of the Court is respectfully directed to the exact language of the Trial Court in the case at bar with reference to the statement that the flight of the defendant is evidence of guilt. It will be noted that the learned Judge states that the flight of the defendant, which was admitted and tesified to by him, was *also evidence of guilt* and a fact for the consideration of the jury, thereby saying to the Jury actually and in effect that the flight was but one portion of evidence of their consideration, the same as any other fact or portion of evidence introduced by the prosecution. The Jury was later advised, in the same instruction, by the Lower Court that the defendant had attempted to explain the flight, and that they were to determine whether the explanation was sufficient. In our judgment, every portion of the evidence introduced by the prosecution in any criminal case, with the exception of formal matters, is evidence of the guilt of the defendant. The very purpose and duty of the prosecuting officers in presenting a case against any defendant is to introduce evidence of the guilt of the defendant.

The Lower Court specifically advised the jury, as appears from the careful and accurate wording of the instruction, that the flight of the defendant, while evidence of guilt, is not sufficient of itself to justify the jury in returning a verdict of guilty, nor does it even go to the extent of saying that the flight of the defendant raises a presumption of his guilt. It states the law in a terse, succinct and able manner, advising them that the flight of the defendant is

evidence which they should take into consideration, and it must be observed that the defendant had admitted that he did fly from the scene of the homicide. It also submits to the jury in the same instruction that the defendant had offered an explanation and then advises the jury that this explanation is for their consideration, as well as the admitted flight, and it is for them to say, under all of the circumstances, whether they believe the explanation or not. If they do not believe the explanation, then there can be no question whatever but that the flight of the defendant, under all of the circumstances in this case, replete as it is with hideous, shocking and brutal details, was positive evidence of the guilt of the defendant.

The second assignment of error avers that the Court erred in admitting into evidence over defendant's objection a certain map, namely Plaintiff's Exhibit M, without proof of its authenticity. Attention is invited to Page 275 of the Transcript of the Reporter's notes. It there appears that objection was made to the introduction of the testimony of one John D. Adams, Chief Clerk of the United States Surveyor General's Office, for the reason that his name was not furnished to the defendant at least two days before the trial of this case. The United States Attorney conceded that the objection was well taken, and the Court sustained the same. Thereupon the Unted States Attorney offered the map in question, which shows upon its face that it was made in the Department of the Interior and General Land Office of the United States, and bears the name of the Commissioner of the General Land Office. Defendant's counsel then made the following objection:

"We object to the introduction of the map for the

same reason and upon the same ground."

The objection immediately preceding the one last mentioned is the one directed to the examination of the witness. Surely the defendant's counsel cannot contend that the government should have furnished the map to him at least two days before the trial! There is no statute or rule of practice which requires such action. Therefore, no objection at all on the face of the record was made to the introduction of the map. This objection was overruled by the Court and defendant excepted. Thereupon defendant's counsel entered into a colloquy with the Court, but made no motion to strike, nor any specific objection. The only method by which he could, after the introduction of the map, seek to eliminate it from the record, was by motion to strike, which he did not attempt. However the learned trial judge stated:

> "The map is in the Department of the Interior, General Land Office, I rule that that is sufficient as a public document."

The map of itself imported verity. It purported to be made in the General Land Office, within the Department of the Interior, and to have been compiled from the official records of that office and other sources. It is a printed copy and the work of the official printing office of the United States. In this connection it has been said:

> "In general then where an official printer has been appointed, his printed copies or official documents are admissible. It is not necessary that the printer should be an officer in the strictest sense, or that he should be exclusively concerned with official work, x x x, as for authentication of his copies, it is

enough that the copy offered *purports to be printed* by authority of the government; its genuineness is then assumed without further proof."

Wigmore on Evidence, and cases cited. Vol. 3 Par. 1684, P. 2157.

It is a well settled principle of law that every officer is presumed to do his duty and that his acts are authorized by law, and this presumption exists until the contrary appears. The map in question appears on its face to have been compiled under the supervision of the Commissioner of the General Land Office of the United States, and he, as any other officer, is presumed to be acting with authority until otherwise shown.

Plaintiff in Error's third assignment is that the Court erred in overruling defendant's objection to the impaneling of certain jurors summoned upon a special venire, whose names were not delivered to defendant below at least two days before the trial. Section 1033 of the Revised Statutes of the United States provides, in effect, that when any person is indicted for a capital offense, other than treason, a copy of the indictment, together with a list of the jurors and all of the witnesses to be produced on the trial for proving the indictment, stating the abode of each juror and witness, shall be delivered to him at least two entire days before the trial. Strict compliance with this statute was had. The names and places of residence of all jurors upon the panel then in attendance upon the court were served upon the defendant more than two days before the trial. It appears that quite a large number of jurors were disqualified upon their examination on their *voir dire*. The panel was exhausted and, in order that the trial might proceed with the

requisite number of jurors in the jury box, as required under the practice of the State of Arizona, to wit, thirty eight, the Court ordered that a special venire issue. The Plaintiff in Error contends that the Government should be required to perform an impossibility. It was utterly impossible to serve a list of the names and residences of the jurors who were summoned on the special venire upon the defendant, two days prior to the commencement of the trial. That his position is untenable is self-evident.

The judgment of the lower court should be affirmed.

Respectfully submitted,

J. E. MORRISON,

United States Attorney for the District of Arizona.

J. C. FOREST,

Assistant United States Attorney for the District of Arizona.

O. T. RICHEY,

Assistant United States Attorney for the District of Arizona.